CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

Friday, June 2, 2000

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:40 a.m. at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Bill Deaver, Kathleen Makel, Carol Scott and Gordana Swanson were present.

Item #1. Approval of the Minutes of the May 5, 2000 Commission Meeting.

The minutes of the May 5th, 2000, Commission meeting were distributed to the Commission and made available to the public. There being no objection, the minutes were approved.

Item #2. Public Comment.

There was no public comment.

Item #3. Adoption of formal opinion prepared by the Commission in response to the request by Burlingame City Council member Joe Galligan regarding the standard of causation required under Section 87103 and Regulation 18706. (In re Galligan, No. O-00-045.)

Commission Counsel Mark Krausse explained that Council member Galligan originally requested an advice letter from the Commission on this issue, and that the Council Member alleged that, regardless of the outcome of the vote, the impact on his financial interest would be the same.

Mr. Krausse reviewed the May Commission meeting discussion, noting that the question was whether the decision would increase or decrease by $150,000 or more the gross revenues of Council member Galligan's economic interest, whether it would incur or avoid expenses of $50,000 in a year or more, and whether it would increase or decrease the value of an asset or liability by $150,000 or more.

Mr. Krausse presented the draft opinion, providing that under the facts presented by Council member Galligan, he has no disqualifying conflict of interest because it is not reasonably foreseeable that the decision will have material financial effect.

Peter Thorner, with the San Francisco Board Sailing Association (SFBSA), explained that the SFBSA was concerned about the Burlingame proposed development because it will be located in the prevailing wind pattern for board sailing.

Mr. Thorner provided background on the issue, noting that the Planning Commission had rejected the development by a vote of 7 - 0, last summer, then rejected it again this summer by a vote of 6 - 0. He stated that the general community opposition believes the project to be too large. He contended that if the City Council does not override the Planning Commission, any project built will ultimately be significantly smaller, and will have a significantly lower end value, and that this will have an impact on the value of the property.

Mr. Thorner discussed the stock ownership of the property and the difficulty of understanding the threshold definitions. He suggested a secondary threshold of $1,000,000. He explained that if the stock of Greater Bay Bancorp (GBB) had an impact of 1%, it would impact Council member Galligan's financial interest by $150,000. He added that there are analysts who watch the bank's portfolio of loans, and if it is determined that the bank is not doing a good job in their loan portfolio, it could affect them by that 1%.

Mr. Thorner indicated that Council member Galligan, through GBB, owned $31,200 worth of interest in the deed of trust for the property in question, and that, in his opinion, that interest was no different from the interest of an individual who owns the same amount in a deed of trust.

The loan, Mr. Thorner pointed out, is an asset of the bank, and that the value of that asset is based on the collateral value of the property. He disagreed with Council member Galligan's assertion that foreclosure would never happen, noting that there is always a risk of foreclosure, and that if foreclosure was impossible, a deed of trust would not have been necessary, because an unsecured credit line could have been used. The ultimate test of the asset is its resale value, he continued, and loans can be sold at a discount, depending on the amount of risk on the loan. The value of the loan on the property in question would be reduced if the Planning Commission's action is upheld, and thereby reduces the value of the property, and hurts the position of the bank.

Mr. Thorner explained that the bank currently has about a 2% reserve against their loan assets for loans that are questionable. If the property in question loses half its value because the larger projects could not be built, it could be considered a high risk loan and could require the bank to add to its allowance for loan losses. A 1% reserve on the loan would be $156,000, and would exceed the $150,000 threshold.

Future loan opportunities on the property, Mr. Thorner stated, would exist for GBB, despite Council member Galligan's assertions that the bank could not make an additional loan. Since the project will be done in phases, he explained, smaller amounts could be loaned by GBB. He added that, once the buildings are built, GBB would then have the opportunity to make a commercial loan to refinance the construction loan.

General Counsel Kathleen Gnekow explained that, in the context of the decision as proposed, the issue revolved around whether or not, at the time Councilman Galligan would participate in the vote, it would be reasonably forseeable that the vote would cause his indirect interest (the bank) to lose $150,000 in the loan interest. Ms. Gnekow did not believe that any of the additional facts presented by Mr. Thorner and the public would change the analysis in the opinion because those facts addressed whether or not Council member Galligan had an indirect interest, and the indirect interest had already been established. She further clarified that those facts do not change the

interest from indirect to direct, because the developer is requesting the approval of the City Council, not GBB.

Assistant General Counsel Luisa Menchaca added that under Regulation 18703.5 the Commission determined that when certain interests were indirectly affected, the personal financial effects rule would not be applied. This was done because analysis for situations like this were done under the indirect business entity test, and it was determined not to be material, but that under the $250 personal financial effect test it was material. The Commission, she stated, determined that it was not equitable.

Mr. Thorner stated that his understanding was that if there was a $150,000 impact to the bank, it was material. The assets of the bank, he asserted, will be impacted by over $150,00 if the Planning Commission action is upheld.

Chairman Getman noted that the facts presented by Councilman Galligan would have to be presumed to be incorrect in order to accept Mr. Thorner's analysis, and that the Commission could not make that presumption.

Mr. Thorner stated that the loan balance of 15.6 million dollars claimed by Council member Galligan was correct, but argued that if the property is devalued to the point that the collateral is suspect and the loan loss reserve must be set up at 1% or more to cover the potential risk, then the assets of the bank have been reduced in excess of $150,000.

Chairman Getman explained that the Commission was not considering the value of the property, in terms of the assets.

Mr. Krausse agreed, noting that the liklihood that the lender might sell the loan on the secondary market when it is due on January 17, 2001, is very low. The Planning Commission's decision to reject the larger project, he added, does not change the zoning on the property, and therefore the asset had not been devalued. Mr. Krausse stated that even though Planning commissioners have commented that the size is too large, the facts provided by Councilman Galligan are the facts the Commission must rely on.

Chairman Getman explained that while she understood the concerns of Mr. Thorner and the community, the Commission can only take the facts that Council member Galligan provides. If those facts are later discovered to be incorrect, the opinion will no longer grant Council member Galligan immunity.

Mr. Thorner questioned whether it was inappropriate for him to present new information to the Commission.

Chairman Getman explained that it is appropriate and important that members of the public come and give their comments. Mr. Thorner's concerns, she continued, were not the sort that could change the outcome of the opinion.

Mr. Thorner responded that the loan balance and new loan issues needed to be considered.

Ms. Gnekow commented that under the fact scenarios presented by Mr. Thorner, Mr. Galligan would not have immunity under the opinion as written. She added that if Council member Galligan can expect to profit personally in some way from having this development go forward, the opinion would not give him immunity from prosecution.

Mr. Thorner voiced his concern that the public will have to allow the vote to occur, and then go to the Superior Court and the FPPC to try to reverse the action. He noted that it is very burdensome for members of the public to undo an action, and that it would be better if the FPPC would take a more pro-active approach.

Chairman Getman noted that Mr. Thorner had other options and could pursue this through his City Attorney, or his City Council, and that he could request that they look at the facts and determine that Council member Galligan does have a conflict and should not vote.

Commissioner Scott explained that the Commission permits a decision based on a presumption, and that if there are other facts presented, the Commission should not make the decision. She asserted that if other facts presented challenge the presumption, it might be inappropriate to make a determination based on the facts as originally presented. She suggested that the relevance of the facts be further explored.

Mr. Thorner agreed, but noted that a development loan would cost more than a home loan in terms of an interest rate.

Chairman Getman pointed out that Mr. Thorner did not know that interest rate.

Commissioner Scott pointed out that staff should not be making determinations about what someone is going to do in the market.

Mr. Krausse noted that the current issue dealt with an opinion that originated in the context of advice, and in the advice setting, public officials request guidance about whether they can participate in a given governmental decision. The advice setting does not allow for public input. The opinion setting does allow for public input.

Commissioner Scott responded that the Commission, in its response, is saying that the Commission is not pro-active and that the Commission waits for irate citizens to file a complaint, and stated that she was appalled that people were being threatened with lawsuits for defamation and questioned how the Commission can get the correct information. She stated that this may be a situation where the Commission should not make a determination because there is not enough information.

Mr. Krausse responded that the people commenting on this issue are less interested in Council member Galligan than in the outcome of the City Council decision. He added that the

Commission was being put in the middle and he stated that staff is required to make "reasonable foreseeability" determinations in the advice context. When contrary facts are presented, he added, staff does consider those facts, but that, in this case, the additional facts did not change the outcome of the conflicts analysis.

Commissioner Scott noted that the Commission had taken into consideration the fact that Council member Galligan's vote would not make a difference, and it appeared that it might make a difference.

Mr. Krausse responded that Council member Galligan argued that the vote would not affect his financial interest.

Ms. Gnekow pointed out that nothing Mr. Thorner presented changed the fact that Council member Galligan's interest in the bank is an indirect interest, and that the opinion states that, because of the many speculative variables involved, it is not reasonably foreseeable or substantially likely that the loan will be paid off at a point in time that the bank suffers a loss in interest more than $150,000.

Mr. Thorner stated that he was not arguing the case of the loan payoff. He noted that all six of the Planning Commissioners requested that the project be downsized. He explained that his presumption of a loan interest rate of 9% was in response to the first presumption that a loan would only earn in excess of $500,000 in interest, which he believed could be in error.

Mr. Thorner noted that if the public is going to have a role, they need more notice. He added that it is difficult for members of the public to get information and it therefore places them in the position of being sued by speaking out when they do not yet have all of the information.

Chairman Getman explained that the Commission was working very hard to give notice to the public.

Mr. Thorner suggested that the local government act on behalf of the FPPC to notify people about issues before the FPPC.

Chairman Getman agreed that it would be a good idea, and pointed out that many local officials were already on FPPC mailing lists and received notification of items before the Commission.

Chairman Getman motioned that the Commission adopt the opinion as to conclusion A, which is the rejection of the "but for" test in favor of the causation test which has been used since the *In re Thorner* opinion.

Commissioner Deaver seconded the motion.

Commissioner Makel requested that the wording on page 5 of the opinion including, "**This is an articulation of the legal standard known as "but for" or "proximate" causation.**

Employing this approach to causation," be deleted from the opinion because it is an incorrect statement.

Commissioner Scott stated that the term, "proximate cause" is a tort term and should be deleted.

There was no objection to deleting the wording as proposed by Commissioner Makel.

Commissioner Scott clarified that Conclusion A was an articulation of the standard, and Conclusion B was the application of the standard to a particular set of facts.

Commissioner Makel also suggested that the heading for Conclusion A be changed to eliminate the reference to "but for".

After further discussion, Commissioner Scott suggested that it be changed to read, "The Commission upholds the *Thorner* test."

The Commission voted "aye" unanimously for Conclusion A.

Chairman Getman motioned that the Commission uphold the opinion as to Conclusion B, which finds that, under specific facts enumerated in the opinion, it is not reasonably foreseeable that Council member Galligan's interests would be materially financially affected, and he, therefore, does not have a conflict.

Commissioner Makel seconded the motion.

Commissioner Scott stated that she was going to vote against the motion because she did not agree that the facts supported the motion and because the facts were not established and should not be considered as true nor should they be accepted as a presumption.

Commissioner Deaver noted that the Commission gets thousands of calls each year requesting guidance under specific sets of facts, and that if the Commission had the public involved in all of those requests, the system would not work. Because of this, he noted, the Commission could make a decision based only on the facts presented. If the situation turns out differently, he pointed out, there are options for the public, including not re-electing their government officials. He pointed out that he was going to vote for the opinion, and encouraged the public to continue watching the process and take further action if it should become warranted.

Commissioner Swanson commented that the staff findings do seem to be appropriate, but that the Commissioners can go a step further than staff. She stated that she will be voting "no" on the motion because it provides Council member Galligan an approval from the FPPC to vote on the matter, and even though the opinion narrowly defines why he is allowed to vote, once that vote is cast, the project will proceed. From a practical point of view, she added, there is a reasonable foreseeability that Mr. Galligan will be materially and financially affected by voting in this matter.

Commissioner Scott agreed with Commissioner Swanson, and added that the public trust is at issue. She added that staff must give the advice requested of them, but that when the Commission is giving a formal opinion, the analysis should be handled differently.

Commissioner Makel stated that she was in favor of the motion, because the Commission was basing its decision only on the facts presented, and that if the Commission does not opine because there may be other facts, then the Commission would never make an opinion. She pointed out that if the facts are incorrect the opinion does not apply.

Chairman Getman and Commissioners Makel and Deaver, voted "aye". Commissioners Scott and Swanson voted "no". The motion carried.

Item #4. Consideration of the Opinion Request in the Matter of In re Solis (O-00-104).

Commission Counsel Hyla Wagner presented the request for an opinion by California State Senator Hilda Solis to determine whether Senator Solis could accept a silver award lantern which was being offered to her as the recipient of the Profile in Courage Award.

Ms. Wagner discussed the nature of the award, which is given to an elected official who stood up for their principles, usually in the face of opposition. She explained that the lamp is made by Tiffany's and costs about $8,000 - $10,000. Ms. Wagner noted that Senator Solis has stated that she has designated that the $25,000 monetary portion of the award be donated to three charities, but would like to keep the silver lantern to commemorate her receipt of the award.

Ms. Wagner explained that the Profile in Courage Award is a recognized nationwide competition and that past recipients of the award include former governors, congressmen and senators. She explained how the recipient is determined, and noted that Senator Solis was recognized for the award because of her work on environmental justice legislation.

A plain meaning interpretation of the PRA, Ms. Wagner explained, would prohibit Senator Solis from receiving the stipend and the lantern. She noted, however, that the prohibition would seem like a harsh result not necessarily consistent with the purpose of the gift limits, which is to prevent a conflict of interest by the acceptance of the gift. Ms. Wagner stated that there is no possibility of bias or a conflict of interest if Senator Solis is allowed to accept the award, because the donor is a nonprofit organization that does not lobby in California and is not connected with any interest group or group that does lobby in California, and does not have any particular legislative agenda.

Ms. Wagner pointed out that under Regulation 18946.5, an exception to the gift limits exists when public officials win a prize or award in a bona fide competition that is not related to their status as a public official. While this is usually applied to allow public officials to keep winnings from contests not related to their status as elected officials, she said, the award is analagous.

The Legal Division, Ms. Wagner stated, has determined that the Commission would be within its authority to draft an opinion which would permit Senator Solis to keep the lantern, or the Commission could deny permission to keep the lantern, utilizing the plain meaning of the statute.

Commissioner Deaver motioned that the Commission grant Senator Solis the right to accept the award.

Commissioner Scott seconded the motion.

Dolores Duran, speaking on behalf of Senator Solis, stated that Senator Solis is the first woman, and the first Californian selected to receive the award. Ms. Duran explained the history of the award.

Commissioner Scott congratulated Senator Solis. She questioned whether there would be a value to the award on the open market.

Ms. Wagner noted that under Regulation 18946, the fair market value is used unless it is a unique gift, and in that case, the value is the cost to the donor.

Tony Miller noted that the issue was not whether Senator Solis deserved the award, but the gift limit issue. He cautioned the Commission against setting a precedent which might allow awards which could create conflicts.

Commissioner Scott noted Mr. Miller's concern, adding that she did not want the Commission to decide the worthiness of awards, but pointed out that there was a determination that no conflict existed in this case, and that she would be against any award which would allow an official to keep a monetary prize.

Mr. Miller responded that the analysis should be limited to specialized items, and suggested that the regulation for prizes and awards could be expanded.

Commissioner Scott responded that an award can still sway a vote, and that the Commission should utilize a two-fold analysis which would include determining whether the award could create a conflict of interest as well as evaluating the type of award being received.

Commissioner Makel stated that the law was extremely clear, and that the potential for a conflict should not be considered. The statute, she continued, under Section 82028(b)(6), specifically states that a plaque or trophy worth over $250 cannot be received by a public official.

Chairman Getman agreed that the plain meaning should be considered, but that the context of the PRA should also be considered. The context of the Act is not to penalize public officials, but to keep them honest and to keep their financial interests disclosed, she stated. If the Commission applies the statute strictly and out of context in this situation, she continued, it becomes punitive because the award was given in furtherance of all of the things the Act is designed to promote with no possibility of creating a bias. Chairman Getman agreed that the regulation needed to be

revisited and that the Commission must be very clear in establishing criteria for determining exceptions. She pointed out other exceptions created by the Commission and noted that there must be common sense application.

Commissioner Makel did not agree that Senator Solis was being punished, and pointed out that the award could have been a nice ceremony and a certificate or something worth less than $250 to commemorate the achievement. She noted that the Legislature looked at the issue and did not allow any exceptions if there were no conflicts, and that they were very clear in delineating that only trophies worth less than $250 could be accepted. Commissioner Makel did not see a distinction between acceptance of a $25,000 stipend and a $10,000 trophy.

Chairman Getman disagreed, noting that she saw a distinction between giving someone a lot of cash and giving them a symbol of the award, unless the symbol is being given in a context in which there is some possibility of bias. She added that, shortly after it was announced that Senator Solis was to receive the Profile in Courage award, another award was announced that was being given by a private company which had set up a nonprofit foundation, and was awarding senators whose votes they were trying to influence in a health care issue. She stated that the Commission was capable of not allowing acceptance of that type of award because of the possibility of bias and influence. She added that the statute allowed for policy decisions and that it was appropriate for the Commission to consider the context of the purposes of the Act.

Commissioner Scott noted that there is no question about the value of a cash award, but that there may be a question about the valuation of the lantern award.

Commissioner Swanson explained that if there was a potential that the organization which is giving the award might lobby the public official she would consider the issue differently. In this case, she continued, there is no reason for the organization to lobby Senator Solis.

Commissioner Makel agreed, but stated again that the law does not allow it.

Commissioner Deaver stated that the Commission should apply common sense. He agreed that the lantern is valuable but has no practical use.

Chairman Getman noted that the Commission allowed Senator Speier to keep a similar public service award because non-politicians were eligible for it. She stated that Senator Solis should be allowed to keep the award, even though only politicians were considered for the award.

Chairman Getman, Commissioners Scott, Swanson and Deaver voted “aye.” Commissioner Makel voted “nay.” The motion carried.

Chairman Getman adjourned the meeting for a break at 10:55 a.m. The meeting reconvened at 11:15 a.m.

Item #5 and #6.

Item #5. Consideration of second quarterly review of CY2000 Regulation Calendar; Staff recommendations.

Item #6. Consideration of Mass Mailing Regulation Review.

Assistant General Counsel Luisa Menchaca presented work plan revisions proposed by staff in order to accommodate the regulatory calendar. She noted that the primary item of concern to staff was regarding agenda item #6, and whether or not the Commission should address the mass mailing regulation.

Commission Counsel Scott Tocher explained that CalPERS requested a modification of the Regulations which would allow CalPERS to use photographs in their mailings, and California Senator Ross Johnson requested that the Commission prohibit mass mailings from legislators proximate to an election. He stated that the Commission might want to study these issues in a comprehensive review of the regulations.

Chairman Getman invited public comments on the issue as well as the rent control issue.

Karen Crommie, resident of San Francisco, discussed the ramifications of public officials in San Francisco who own rental property there and who are unable to vote or discuss subjects dealing with rent control. Ms. Crommie stated that the *Ferraro* decision, if upheld, would have no impact on the San Francisco Board of Supervisors situation. She supported staff recommendations that cities in California with rent control would be treated differently.

Scott Hallabrin, from the Assembly Ethics Committee, speaking on behalf of Assembly Speaker Robert Hertzberg, opposed revisiting the mass mailing regulation at the current time. He noted that the Assembly has adopted a permanent rule banning various mailings sixty days prior to any election in which a member is on the ballot. This practice was being done on an *ad hoc* basis in the past, he stated, but is now a permanent rule.

Mr. Hallabrin pointed out that the mass mailing regulation attempts to balance the flow of information from public officials to their constituents while reducing the political benefits elected officials receive by using government funds to pay for the mailing of that information. He added that there will always be tension between the two goals and that there will not be a perfect solution.

Mr. Hallabrin observed that the Commission has already had three different versions of the regulation, and that there appears to be a general consensus about how the regulation works. He added that the literal translation of the statute could halt all government mailings. Mr. Hallabrin noted that when the Court, in the *Watson* case, upheld the statute, it was upheld largely because the Court was relying on the regulation as an accurate interpretation of the statute. If the Commission changes the regulation, he added, it could result in a judicial challenge.

Robert Leidigh, on behalf of the Senate Rules Committee, urged that the Commission leave the regulation intact.

Mike Martello, City Attorney of Mountain View and on behalf of the League of California Cities, stated that if the regulation is revisited, it should be studied in total and simplified. He voiced his concern that the issue of electronic mail and faxes needed to be pursued. The biggest issue, he added, was the "accidental" letters sent by public officials' staff members who did not understand the mass mailing regulation.

Commissioner Deaver noted that the Commission is trying to get approval from the Legislature to fund the expansion of educational efforts.

Mr. Martello noted his support of the expansion of the educational efforts.

Chairman Getman suggested that the mass mailing regulation be added for discussion on next year's calendar.

Commissioner Swanson agreed that the Commission should explore the mass mailing issue next year, and encouraged the Commission to solicit input from the Davis administration and other constitutional offices, including cities, counties, school boards, special districts, community colleges and all elected officials.

Commissioner Deaver agreed with Commissioner Swanson, but noted that the Commission had only received one request to revisit the mass mailing regulation and he questioned the priority of the mass mailing issue.

Ms. Menchaca suggested that staff include it in the proposed regulatory calender for next year which would be presented to the Commission for pre-notice discussion in October.

Chairman Getman agreed, noting that the budget and policy goals should also be considered at that time. There was no objection from the Commission.

Item #7. Materiality standards for business entities: Repeal and re-enact Regulation 18705.1 (Conflicts project, phase 2, project A).

Commission Counsel John Vergelli introduced this second discussion of the proposed revisions. He noted that the tentative decisions reached by the Commission at its February meeting were incorporated into the revised draft before the Commission.

To make the changes easier to review, staff proposed the repeal of the existing regulation and reenactment of the revised regulation.

Mr. Vergelli explained that the first decision, clarifying that materiality would be presumed when the business entity is directly involved in the governmental decision. There was no objection from the Commission.

The second decision, Mr. Vergelli continued, was to determine what must be shown to rebut that presumption, if the presumption is incorrect. The options were (1) to retain the present rule by showing that there is no financial effect on the business entity which is directly involved (This option has been suggested to be artificially low and unreasonable because financial effects may be quite trivial compared to the size of the business entity, but does allow a "bright line" test that would be easier to determine and enforce); (2) to establish a *de minimis* rule, which, while more complicated, would allow a trifling or inconsequential financial effect without creating a conflict (This option creates a subjective test which may be impossible to enforce); or (3) a *de minimis* rule which would have a specific amount of money established as the amount which can be considered to not create a conflict.

Enforcement Division Chief Cy Rickards stated that the *de minimis* rule was subjective, and would require that Enforcement go to greater effort to show that the financial effect is more than *de minimis*. He added that Enforcement Division was already not pursuing those cases where the amount of the financial effect was trivial. He noted that if the *de minimis* rule is adopted as a regulation, it will make giving advice as well as enforcing the regulation very difficult, but added that is could be enforced. Mr. Rickards explained that the "bright line" rule was both easy to understand and easy to enforce, and noted that this rule pertains to directly involved financial effects, not indirectly involved financial interests.

Mr. Vergelli explained that if a company wanted to remove a tree, and applies for a permit to do so, the company would have a direct involvement, but the financial effect would be less than $100, and might therefore be considered a *de minimis* financial effect under the proposed rule.

Chairman Getman further explained that if the tree was located in front of a public official's home, then the financial effect on the public official might be considered *de minimis*.

Mr. Rickards stated that if the *de minimis* standard makes advice and enforcement more difficult, it should not be the reason that the Commission reject the standard, noting that it is a difficult issue that may require judgment calls.

Mr. Vergelli encouraged the Commission to consider that sometimes advice will need to require that the public evaluate their circumstances, and noted that the real property regulations are receiving criticism because they require that the public evaluate their circumstances.

Mr. Martello stated that he believed the *de minimis* rule was very close to the "one-penny" rule, and that there is little to gain from it. The larger issue, he argued, was whether the public official retains the exception.

Mr. Vergelli stated that he did not know whether the *de minimis* rule was incorporated in any other regulatory schemes.

Commissioner Makel stated that she was in favor of option a, especially since it involved a direct financial effect.

Chairman Getman clarified that this would retain the current system, allowing a *de minimis* standard to be used as a prosecutorial discretion only.

There was no objection from the Commission.

Mr. Vergelli explained that an exception was created by the Commission which would allow a public official who has an investment in a very large company to use the materiality standards for an indirect business entity even though the business entity may be directly involved, and asked whether the Commission wanted to retain that exception.

He noted that the exception would only apply to investment in a very large company, and that the investment must be less than $10,000.

Chairman Getman expressed her concern that this would mix up a personal investment with the impact of the company. She explained that she questioned why the size of the official's personal investment should be considered in determining whether something is material to the company.

Mr. Vergelli responded that this would be the only place in the regulation where this type of consideration is done. He noted that it arguably only happens to a certain extent in the personal financial effects regulations. He did not believe that the issue could be covered in the investment regulations, but suggested that it might be included as part of the definition of what an economic interest in a business entity is. However, he added, that may require statutory action.

Robert Leidigh explained how the exception originated, noting that a small investment in a very large publicly traded company was assumed to be an investment shared by a number of other individuals in a community, and so a "public generally" situation was recognized. If the official held a position in the company the exception did not apply because the interest was greater. The purpose of the exception, he noted, was to avoid absurd results while keeping the "bright line" standards.

Ms. Menchaca stated that there have been some questions, specifically from state employees, regarding this exception.

Mr. Vergelli noted that the controversial nature of the issue varies in different jurisdictions.

Mr. Martello stated that the existing rules do create absurd results. He urged the Commission to either retain the exception or find a better solution. He did not believe that the exception should be broadened, and that it should just be applied to investment interests. Mr. Martello proposed that the $10,000 threshold should be adjusted to $20,000 - $25,000, which would keep it equivalent with indirect standards.

Commissioner Makel stated that she wanted the exception, but questioned whether to keep the $10,000 threshold.

Mr. Vergelli clarified that the Commission had tentatively decided to retain the exception in principle, to continue to limit the exception to investment type interests, and that the last decision which needed to be made was the cap figure.

Mr. Vergelli stated that, while staff had recommended the $10,000 threshold, he had no objection to raising that to the higher levels recommended by Mr. Martello.

Mr. Rickards stated that Enforcement had no objections to raising the threshold.

Commissioner Deaver recommended that the Commission raise the threshold to $25,000.

Commissioner Makel agreed.

There was no objection from the Commission.

Chairman Getman adjourned the meeting to closed session at 12:15 p.m.

The public session reconvened at 1:35 p.m.

Chairman Getman noted that attorney Bob Leidigh, formerly with the FPPC and currently with the law office of Olson, Hagel, Leidigh, Waters and Fishburn, was leaving his position at the law office and had accepted a position at the Attorney General's office. She congratulated him and encouraged him to continue his involvement with the FPPC.

Mr. Vergelli explained that Chairman Getman had suggested that lines 22 and 23 of the proposed regulation be changed to delete "If the business entity is listed in the Fortune 500, or the business entity is listed, or meets the financial criteria for listing, on the New York Stock Exchange," and that on line 24 the word "and" be changed to "if" so that the line would read, "**(2) Exception: If the public official's *only* economic interest**...."

Chairman Getman left the meeting at 1:40.

Mr. Vergelli explained that the change was not substantive, but eliminated a redundancy.

Mr. Vergelli discussed the differences between direct and indirect involvement in a government decision, and introduced the discussion for indirect involvement. He noted that the discussion would involve business entities, and that public official involvement in the business entity is not currently planned to be discussed as a part of the Phase 2 project.

Mr. Vergelli noted that the project builds on the tentative decisions made by the Commission in February, 2000, including keeping the current regulatory strategy, consolidating the categories

from seven to four categories, using certain criteria to define the four categories, and continuing to measure materiality in terms of the decision's impact on the gross revenues, expenses, assets and liabilities of the business entity.

Mr. Vergelli noted that the next decisions involve what to do with the materiality standards. He outlined the difficulty of getting data about non-Fortune 500 businesses into a useful form. Most public interest, he noted, revolved around the Fortune 500 category. Staff recommended that the Commission adopt a ten-fold increase in the materiality standards because of the size of the companies and because there has been roughly a ten-fold increase in economic indicators for those companies.

Mr. Vergelli explained that on page 2 of Appendix B, under (c)(1)(A), (B), and (C), the first bracketed dollar figures in each section indicated the current rule, the second figure represented the current rule adjusted for the Consumer Price Index (CPI), the third figure represented considers the current rule, adds the CPI and rounds it up, then adjusts it higher so that it will be a reasonable amount for the next few years, and the fourth figure represents a ten-fold increase for the very large companies.

Mr. Vergelli stated that he believed the ten-fold increase for the very large companies to be fair. He referred to the statute requirement that the financial effect be "material" and noted that the very large companies should be treated differently.

Tony Miller agreed that the ten-fold increase was appropriate for the very large companies.

Mr. Vergelli explained that there was not as much public interest in the smaller companies, probably because not as many people are invested in those companies and those companies have not had the same level of economic change in the last ten or fifteen years. Consequently, he added, there was not as much need for a dramatic increase in the dollar thresholds for the New York Stock Exchange and NASDAQ companies (providing that they are not Fortune 500 companies), and for the small businesses. He recommended that those be adjusted for inflation and increased enough to make the amounts reasonable for the next few years.

Chairman Getman returned to the meeting at 2:05 p.m.

Mr. Vergelli noted that, instead of using the CPI for these companies, the Gross Domestic Product (GDP) be considered as a general indicator for the economic effects on the companies.

Chairman Getman explained that she had learned that, from 1985 to 1999, the GDP has changed 119.7% - roughly doubling it.

Mr. Vergelli noted that the staff recommendation for the NYSE, NASDAQ and smaller companies was to roughly double the thresholds, which would be in line with the GDP growth.

There was no objection from the Commission to the ten-fold increase in the thresholds in Regulation 18705.1 (c)(1).

There was no objection from the Commission to doubling the thresholds in Regulation 18705.1(c)(2).

There was no objection from the Commission to doubling the thresholds in Regulation 18705.1(c)(3).

There was no objection from the Commission to doubling hte thresholds in Regulation 18705.1(c)(4).

Mr. Vergelli suggested a change in the sentence on page 2, line 5, of the proposed reenactment, changing the words "materiality standards" to "dollar amounts." The purpose of that sentence, he explained, was to clarify which category should be used if a business is in the NYSE and is listed in the Fortune 500 allowing the business to use the most lenient threshold.

There was no objection from the Commission to the wording change.

Mr. Vergelli explained that the term "asset" needed to be defined as it is used in the materiality regulations. He noted that the discussion is a pre-notice discussion and would allow for more input. The draft regulation provided two options for the Commission to consider, he added, and would apply only to Section 18705.1.

The first option, he explained, was simple and inclusive, applying to all business entities and equating assets with property. The second option allows more flexibility, recognizing that different industries have different practices.

Chairman Getman suggested using the same definition for "assets" as is used in the accounting profession.

Mr. Vergelli noted that staff did not incorporate the accounting profession standards because they did not have time to investigate that definition, but noted that option b could explicitly reference to those standards.

Chairman Getman stated that she liked the option of using the accounting profession standards because they are written and accepted by a profession that works with assets, but noted her concern about whether those standards are in line with the purposes of the PRA.

Mr. Vergelli noted that the Commission did not need to decide the issue at this meeting because it was a prenotice discussion.

Commissioner Swanson suggested that the issue be revisited.

Commissioner Makel agreed, and questioned whether the promissory note and the real property which secures it would be a part of the discussion.

Chairman Getman responded that it would be folded into the definition. Under accounting standards, she explained, the property would not be considered, but the deed would be considered.

Mr. Vergelli explained that if the Commission chose option a, this would have to be explored further. However, he noted, if the Commission chose option b, it would not be necessary.

Mr. Martello commented that if option a were to include the word "intangible," it should be tied to "considered an asset under generally accepted accounting standards." He believed that patents and copyrights would be considered an asset on a balance sheet, but there are others that are not, which should be taken under consideration.

Chairman Getman stated that option b might be better, but that staff should explore the generally accepted accounting standards.

The Commission directed Mr. Vergelli to bring the definition of "asset" back to them for further consideration.

Item 8. Clarifying the Meaning of "Doing Business in the Jurisdiction" (Conflicts project, phase 2, project N). Pre-Notice Discussion of Proposed Regulation 18230.

Staff Counsel Natalie Bocanegra presented this project, explaining that public officials are required, under the PRA, to identify their economic interests, including income, investments and business positions. She noted that the PRA limited those economic interests to those with entities that do business in the jurisdiction of the public official, and that according to the Commission's *In re Baty* opinion, "doing business in the jurisdiction" was defined to mean, "having business contacts with the jurisdiction." She further explained that the Commission also concluded in that opinion that several activities constitute doing business in the jurisdiction, and that those activities include maintaining manufacturing facilities, distribution facilities, and conducting sales on a regular basis in the jurisdiction.

Ms. Bocanegra noted that the opinion has provided guidance to the Commission since 1979, but that marketing over the Internet has generated requests for advice which are difficult to answer, and that the Commission may need to address and define the term "marketing". She explained the issues before the Commission, noting that if the Commission chose to adopt a regulation defining the term, it must then decide whether the definition should be applicable to the entire PRA.

Ms. Bocanegra explained that Section 87350 of the PRA has phraseology which incorporates the same concept as "doing business in the jurisdiction," and that, for purposes of consistency and to facilitate later regulatory amendments, the definition should be applied to the entire PRA.

Robert Leidigh, speaking for the Senate Rules Committee, noted that staff was encouraging an expansion of the Commission's interpretation of the term. The purpose of the term, he noted,

was to alert both the official and the public about potential conflicts, and that there needed to be some sufficient nexus with the official's jurisdiction to give rise to the prospect of a conflict. He noted that the court determined in *City of Carmel by the Sea v. Young*, that the public's right to know is limited by those interests that could be impacted by the official's actions acting in their official capacity. His concern, he stated, is that the nexus be retained so that officials will not be required to disclose their private affairs unnecessarily. He noted that officials will have an added burden of documentation.

Mr. Leidigh pointed out that the marketing language proposed would require unnecessary disclosure. He noted that AB 2412 (Migdon) addresses imposition of a sales tax on Internet sales, and that the Legislature is struggling to come up with a nexus standard which is similar to what the Commission is trying to do in this regulation. The Legislature, he stated, is trying to require a physical presence of the business in order to impose the sales tax. He urged the Commission to proceed carefully, and noted that the regulation still had references to "planning on doing business in the jurisdiction," and suggested that it might be better addressed by legislation.

Commissioner Swanson expressed her concern that the Commission may be delving too deeply into the privacy of people's lives. She agreed that the public interest must be protected, but noted that this recommendation may be excessive.

Ms. Bocanegra stated that an FPPC advice letter regarding radio advertising determined that the entity was not doing business in the jurisdiction of the public official, even though the advertisements presumably reached the residents of the jurisdiction. Mr. Leidigh's concerns, she stated, were considered when writing the language for the proposed regulation. She added that billboards, radio and television advertising, and telemarketing present important policy issues that the Commission will have to consider.

Commissioner Deaver commented that television advertising is often aimed at local residents of the television station area, and not at viewers far away who are watching via cable or satellite.

Chairman Getman noted that if "marketing" were included in the regulation, then a business could be considered to be doing business in the jurisdiction, even though the jurisdiction is too far away for the official to actually do business there.

Ms. Bocanegra responded that the proposed language in the regulation sought to restrict passive contact. She explained that the options differentiated between just contacting someone in the jurisdiction, and both contacting and requesting information from persons in the jurisdiction. She noted that it included Internet websites because, within personal jurisdiction law "sliding scale" approach is used for evaluating whether a website is passive or active.

Ms. Menchaca stated that this issue arose from staff's advice incorporating Form 700 instructions. Staff believed that the rule should be in the regulations, not in a form or manual. She agreed that *In re Baty* provided guidance, but noted that much has changed since that opinion, and that this project would update the opinion and put it in the regulations where it would be more accessible.

Chairman Getman noted that there seemed to be a consensus to at least put *In re Baty* in a regulation so that the public will have access to it.

Ms. Bocanegra pointed out that *In re Baty* does include the language, "having business contacts with the jurisdiction," but it did not provide any type of analytical framework or criteria to explain what "business contacts" are.

Chairman Getman stated that there had been an Interested Persons meeting on this subject, and that most of the contentiousness of the project revolved around the Internet marketing issues.

Tony Miller agreed that marketing should be addressed in the regulation. He added that he interpreted last year's advice letter to indicate that the Internet is enough to establish "doing business in the jurisdiction," and that there should be clarification of that advice letter. There is a distinction, he noted, between online sales and advertising over the Internet, and the Commission should deal with those distinctions. He stated that an Internet solicitation of customers should qualify for "doing business in the jurisdiction." He cautioned against using tax concepts and civil lawsuit nexus concepts because they address a different interest.

Commissioner Deaver noted that magazine advertising is no different than the Internet.

Mr. Miller stated that advertising alone should not qualify, but solicitation over the Internet should be considered "doing business in the jurisdiction," even if a sale is not made.

Commissioner Deaver noted that all advertising is designed to solicit sales.

Mr. Miller pointed out that television advertising is more tenuous than online solicitation. He added that the public has a right to know if a public official has an investment, a source of income, or holds a position in a business entity, and that, as a public official, a certain amount of privacy is given up.

Ms. Bocanegra noted that Enforcement Division expressed concerns regarding using the limiting language of "regular" or "substantial" to clarify the circumstances under which an adopted regulation or a definition would apply. However, she noted, the implications from an enforcement standpoint are that it could introduce terms that are vague. She pointed out that the Commission has already used this language in other regulations and sections of the PRA. Another enforcement concern, she continued, dealt with whether to use the term "and" or "or" in the marketing definition.

Chairman Getman asked whether, if she had an investment in Speigel Catalog Company, from Chicago, she would have to report Speigel Catalog Company on her Form 700.

Ms. Bocanegra responded that, if distribution of Spiegel products was being done on a regular basis in the jurisdiction, it would have to be reported on the form 700.

Technical Assistance Division Chief Carla Wardlow agreed that it would have to be reported.

Mr. Leidigh pointed out that sometimes an official has no way of knowing if their stock is in a company that has a website doing business in the jurisdiction, and that limiting it to a company that does business from a physical locality in the jurisdiction would a better way to define "doing business in the jurisdiction." He added that he believed it does tie into tax law, because if a nexus is established to collect the taxes it would make enforcement easier because enforcement could investigate to find out if the business entity is paying taxes in the jurisdiction.

Chairman Getman explained that the Commission received a request from a company that makes government contracting easier by bringing together entities which could fulfill a government contract with the local jurisdictions, and serves as a contractor. In those cases, she noted, the business has no physical locality in the jurisdiction, but is doing business in the jurisdiction.

Mr. Krausse noted that AB 2720 just passed out of the Assembly, and is likely to pass, and creates a commission to examine all Internet and PRA issues. The Commission could, he suggested, wait for the new commission to develop a strategy for this issue.

Commissioner Deaver suggested that the FPPC wait for the new commission.

Chairman Getman suggested that the FPPC could also wait and see how the Migdon bill does with the sales tax issue.

Ms. Menchaca noted that staff is supposed to come back to the Commission in August with this issue.

Mr. Krausse pointed out that staff may know by then whether the two bills have passed, and should at least have an analysis and language and would know what the Legislature thinks the FPPC should be doing with this.

The Commission agreed to follow the two bills for guidance and requested that staff return the project to the Commission in August for the second pre-notice discussion.

Ms. Bocanegra noted that a number of Chambers of Commerce were invited to the Interested Persons meeting, and, while there was some interest, no representatives attended.

Chairman Getman suggested that staff contact them again to find out what the Chambers of Commerce are doing regarding this issue.

Ms. Menchaca noted that staff will be focusing attention on the marketing issue of this project, and that staff would probably not make modifications to other parts of the Regulation.

Item #9. Legislative Report.

1. AB 1838 (Leonard) Conflicts of Interest: Public Generally Exception.

Government Relations Director Mark Krausse stated that this bill had passed out of the Assembly and is currently in the Senate, and expected that a hearing would be held in early July.

Chairman Getman noted that the Commission had previously taken a neutral position on the bill.

Mr. Krausse explained that the bill provided that definitions in Section 87102.6 would apply to terms used in Section 87103. He stated that the Realtors' Association, sponsors of the bill, intended to include an industry, trade or profession as part of the "public generally" and he believed that it would be reasonable to expect that any recognized subgroup or specialty of the industry, trade or profession could be recognized as a significant segment under the bill, bootstrapping other regulations. He added that all of the provisions of the legislator's section could be incorporated into those conflict of interest statutes applying to everyone, because "significant segment" is in the regulation.

Mr. Krausse believed that the bill's impact will be broader than the Realtors' Association intended it to be, and he presented four enforcement cases that would not have been brought if AB1838 had been law. The Realtors intended, he stated, to involve only indirect cases, but the bill would apply to both indirect and direct cases. Additionally, he continued, the Realtors wanted an exception for those instances where the official may not be financially affected at the time of the vote, but may be financially affected in the future. He suggested that if the Commission did not want to oppose the bill, it should at least be amended.

Mr. Krausse explained that in two of the four sample enforcement cases, the official had an indirect involvement. The other two examples could be considered direct involvement, but the exception would still apply. He recommended that the Commission consider wording an amendment to the law, rather than cross referencing Sections 87102.6 and 87103.

Stan Wieg, representing the California Association of Realtors, requested that the Commission not oppose the bill, as recommended by staff. He suggested that the Commission seek amendments to the bill.

Mr. Wieg explained that the Realtors must have a treatment of the distinction between indirect conflicts, noting that just because a decision involved real estate and an official has a real estate license, the official should not be considered to have a conflict.

Mr. Wieg stated that the "public generally" rule should be changed to redefine "forseeability."

According to current regulations, Mr. Wieg noted, a single trade, profession, or industry group cannot be considered a significant section of the public. If enough people are indirectly affected, he noted, the law should allow participation. He suggested that the group could be defined by whether or not they are licensed, whether or not they are regulated, the number of people in the group, or possibly aggregating different kinds of industry groups. The legislator's rule would be an appropriate rule, he added, because it is a much looser rule.

Mr. Wieg also requested that a standard of care be established, pointing out that a public official should not have to have an appraisal done in order to determine whether they can participate. Conversely, he added, if the judgment of a reasonable person is done in good faith, and competent legal representation has been solicited, then the official ought to be able to rely on that legal opinion and not have to worry about being prosecuted.

Mr. Wieg stated that he would rather have the bill worded in such a way that it would only apply to indirect interests.

Chairman Getman stated her concern that the bill was too broad, and suggested that it would be better to wait until the Commission's project was finished and then go to the Legislature, if necessary, with a number of legislative changes.

Mr. Wieg responded that the bill needed to be out of Committee by the beginning of July, 2000, or it will die by Senate rules.

Mr. Krausse stated that he has been unable to articulate the concerns of the Commission to legislative staff because the Commission has taken a neutral position on the bill. He added that if the Commission opposed the bill unless it was amended, it would allow him to work with legislative staff, and would still allow the Commission to support the bill if they choose to once the bill is amended.

Commissioner Makel noted her concern about the direct and indirect involvement issues.

Mr. Krausse responded that it might not be good for the PRA or the Commission if the issue is resolved legislatively instead of through regulations, because it is hard to change once it has passed.

Chairman Getman explained that she was not sure if this was a question of including industries in the exemption, and suggested that may be a question of foreseeability. She noted that *Teasley* considered it a conflict if something were to create a financial effect somewhere far into the future, and that a regulation correcting that interpretation could eliminate the need to redefine the

"public generally" exception. She was concerned that if the issue of foreseeability was addressed in a regulation, then the bill redefining "public generally" could be unnecessary and create unintended consequences.

Commissioner Makel noted that if a regulatory change is not made, the Commission might not want to take steps to block a citizen effort to change the law.

Chairman Getman suggested that it did not need to be changed immediately, and that she was not in favor of rushing to support a change she was not comfortable with.

Commissioner Makel stated that the Commission should not support the bill, but that if the Commission opposes the bill unless it is amended, it would allow staff to express the Commission's concerns to legislative staff.

Chairman Getman noted that staff will be presenting the Commission's views on the bill to the sponsor of the bill during the week of June 5, 2000, and that the Commission should provide staff with guidance.

Commissioner Deaver voiced his concern that other professions may want the same exception. He compared the arguments on this issue with the arguments on the rent control issue.

Mr. Wieg stated that if the Commission changes the foreseeability regulations correctly, it will not be a realtor specific industry regulation. The rent control issue, he added, is more contentious because of its history of problems. He did not believe it mattered whether the problem was corrected by legislation or regulation.

Commissioner Deaver stated that the Commission should oppose unless the bill is amended.

Mr. Wieg noted that it must be dealt with by staff quickly.

Mr. Rickards agreed that the Commission should change its neutral position on the bill, in order to allow the Commission to express its concerns. He added that it would be better to address the issue through regulation, but noted that the bill must be addressed in some way.

Jim Knox, with California Common Cause, urged the Commission to oppose the bill unless it is amended, noting that if the bill is passed it will be damaging to the public, and the Commission had a responsibility to the public to guard the PRA.

Commissioner Makel stated that the amendments should allow the exception only in cases of indirect interest.

Mr. Krausse noted that it may not need to be done on an industry-wide basis, and suggested that the Commission may want to develop a first draft for a regulation which could be used in the bill. The Commission could then take a neutral position on the bill and work out the differences.

Mr. Rickards reiterated that foreseeability and standard of care were the major issues.

Chairman Getman asked the Commission if they were in favor of being opposed to the bill unless it is amended, and advising the author of the Commission's concerns with the language as it currently stands as well as providing parameters for a regulatory solution for those of Mr. Wieg's issues that the Commission supports.

There was no objection from the Commission.

B. SB 2076 (Polanco) Forms Simplification: Repeal of Petition Circulator Disclosure.

Staff Counsel Scott Tocher reported that the legislation passed unanimously in the Senate ElectionsCommittee, making the bill eligible for the consent calendar on the Senate floor, to be passed to the Assembly for consideration. Due to the McPherson Report, he noted, there was a slight conflict in the legislation concerning the travel log, and the bill has been taken off of the consent calendar and staff will be speaking with the legislative staff to resolve the issue.

Mr. Krausse explained that Senator Poochigian may have pulled the bill off of the consent calendar because it included eliminating the requirement to report the name, address, date, and purpose of travel be listed separately as a travel log, but the McPherson Commission recommended that the travel log be retained for out-of-state travel. There were no objections from the Commission.

Commissioner Swanson questioned what happens to an elected official's account which is set up for travel, outside of the campaign.

Technical Assistance Division Chief Carla Wardlow responded that it would be treated as an office holder account, which requires the same type of reporting as any other campaign account, and that they are considered to be contributions. Otherwise, she added, they would be considered gifts and would be subject to the $300 limit, and any monies spent from that account would be reported as expenditures.

Chairman Getman explained that the forms simplification bill addressed a portion of the PRA that has been deemed to be unconstitutional after the *Buckley v. ACLF* decision. She noted that the Commission is in a difficult position right now, because they must direct Enforcement staff to enforce the statute. The Commission hoped that the forms simplification bill would take care of the matter for now, but since the bill has been delayed, the Commission had to explore other options.

Ms. Gnekow stated that the Commission could request an Attorney General opinion on the issue, but she noted that it is discretionary for the Attorney General's office to issue that opinion. She explained that, if an opinion is written, it might be done in three or four months, but could take longer.

Chairman Getman noted that, even if the opinion was written, it might not help the Commission. She explained that the statute may be unconstitutional, but since an appellate court has not ruled on this particular statute it still had to be enforced.

Ms. Gnekow explained that the Ninth Circuit decision on *Buckley* are rulings on almost identical statutes, but not the California statute.

Ms. Gnekow also explained that another option would be a friendly lawsuit by a member of the regulated community for purposes of clarification of the law.

Commissioner Scott asked whether an an action for declaratory relief could be filed by the Commission.

Ms. Gnekow responded that the Commission had to have a plaintiff to go through the court system. She also pointed out that any taxpayer could bring a taxpayer action against the Commission because the Commission would be spending taxpayer monies to enforce an unconstitutional law.

Chairman Getman noted that the Alcoholic Beverage Control Board was enforcing an unconstitutional statute and the members of the Board were sued, and the courts did not give the Board members immunity.

Mr. Rickards stated that the Commission could publicly refuse to enforce the law.

Chairman Getman noted that there is a provision in the PRA which allows the Enforcement Division to ask the Commission a question of law.

Commissioner Makel supported publicly refusing to enforce the law, noting that, in either case, the Commission violates the law.

Ms. Gnekow stated that there was a similar provision in the Election Code which the Secretary of State would not enforce, and that the Attorney General issued an opinion supporting the action by the Secretary of State's Office by noting that requiring the activity would have been unconstitutional, but avoided addressing Article III.

Chairman Getman suggested that the issue needs to be discussed again by the Commission after more study, in order to make sure that the significance of the decision is considered carefully.

Commissioner Makel stated that she would like to see the "such statute" language.

Ms. Gnekow stated that no identical statute exists, but that a Washington state case was very similar.

Chairman Getman stated that a very similar statute existed but that it might not be considered as "such." The Attorney General, she added, might not be willing to make that determination, but the courts would.

Ms. Gnekow explained that an agency must enforce the statute unless it has been determined to be unconstitutional by an appellate court who has construed such statute, and that such statute refers back to the statute that had to be enforced by the agency.

Chairman Getman noted that it was very clear that it was intended to reign in agencies that were trying to do exactly what the Commission was trying to do.

Commissioner Makel noted the uniqueness of this case, pointing out that in most cases there would be no appellate court opinion.

Chuck Bell, from Bell, McAndrews, Hiltachk, Davidian, offered to initiate discussion among interested parties about bringing a friendly action, by way of writ, to address the issue.

Tony Miller explained that he ignored Article 3 when it was very clear that the U.S. Constitution prevailed. No one ever sued or challenged him, and he did not think that, other than Mr. Bell's proposed friendly action, anyone would sue the Commission. He did not think it would be necessary for the Commission to be concerned about it.

Chairman Getman stated that she was not comfortable violating the State Constitution, and suggested that staff discuss the issue and look at other pieces of legislation for guidance. She noted that the Forms Simplification bill may pass, but that if it does not pass, it will put the issue a year behind.

Mr. Krausse stated that the Commission will know by the end of September, when the Governor's actions will be final.

Mr. Krausse reported that the Commission is awaiting final action by the Budget Conference Committee for a Public Education Unit, and then it will go to the Governor's office.

Chairman Getman asked for public support in getting the Public Education Unit.

ENFORCEMENT MATTERS

Adoption of Enforcement Policy

Enforcement Chief Cy Rickards explained that this proposed program was explored and designed by staff investigator Jon Wroten, with the help and support of Chief Investigator Al Herndon.

Item #10. Late Contribution Reporting Violations - March 7, 2000 Election.

Chief Investigator Al Herndon introduced this project, noting that it was an outgrowth of the major donor issue discussed in the fall of 1999. He updated the Commission on the current status of the campaign filing schedule with regard to the March, 2000 primary election.

Mr. Herndon stated that electronic filing has enabled staff to gather filing information from the Secretary of State's office in a much more timely manner. Staff analysis, he pointed out, compared late contribution reports filed by recipients to those filed by contributors, examined individual committee files, and assembled a list of discrepancies and was limited exclusively to state level election activity,

Mr. Herndon explained that the discrepancies could be explained in several ways: (1) the contribution could have been made during the second pre-election period but was received during the late contribution period, or (2) the contribution could have been made during the late contribution period but is actually not received until after the election, or (3) a report was filed but was unavailable when the data was reviewed, or (4) a violation had occurred, or (5) other unanticipated possibilities.

Mr. Herndon stated that Enforcement staff utilized a $10,000 threshold because it corresponded to the major donor qualification threshold (which makes the analysis easier), and because it is one of the factors used by the Franchise Tax Board auditors in making materiality judgements.

The proposed process, Mr. Herndon explained, would (1) identify potential discrepancies utilizing the Secretary of State's electronic filing system; (2) send a letter to the person who is the source of the discrepancy to determine whether a violation exists, and (3) process a one-page streamlined stipulation with an itemized list of those contributions which have not been reported attached to it. The advantages to the process are (1) more timely resolution of the issues which would make the information available to the public before the election, (2) a faster resolution to the extent that someone wants to participate in the program, (3) it is very simple, and (4) it provides an equitable resolution to all non-filers included in the program. The disadvantages to the proposed program are (1) it will result in limited background information to the Commission and to the public, and (2) there would be no subjective evaluation of public harm.

Mr. Rickards noted that Enforcement Division established the $10,000 as their proxy for the public harm in the context of the statewide elections.

Commissioner Scott remarked that in some races $10,000 is a huge amount of money and in other races $10,000 is a small amount of money, and requested more information.

Mr. Wroten noted that $10,000 and above represented about 20% of the filings, and that there were many contributors who gave $1,000 during the late period on a single contribution and that they made only one contribution. He added that staff researched 5,600 individual late contribution reports representing approximately $25,000,000 given during that sixteen day period to candidate committees and proposition measures. He stated that 648 of the 5,600 late contributions made met the $10,000 threshold and the $6,000,000 represents about 25% of those late contribution monies.

Commissioner Scott requested that staff explore adding another threshold level below the $10,000 threshold.

Mr. Wroten stated that the information could be made available to the Commission, and noted that the discrepancies uncovered using the $10,000 threshold have resulted in an approximate 20% increase on Enforcement's annual caseload.

Commissioner Scott observed that if the program is going to proceed as smoothly as anticipated, it might be possible to lower the threshold because the need for additional Enforcement resources may not increase substantially.

Mr. Herndon clarified that this program would not be applicable to local elections, and noted that if the threshold is under the $10,000, the contributor may not be assumed to be considered a committee with a filing requirement.

Mr. Herndon explained that under the new system, the full history of the case would not be presented to the Commission when the stipulation is presented for Commission approval.

Chairman Getman noted that it is modeled, in some ways, after the Federal Elections Commission's new "traffic ticket" program. She added that if other violations are found, the Commission could pursue the additional violations, and noted that this program does allow the Commission to pursue the initial violations before the general election, and may lead to no additional violations during the general election by the same people.

Commissioner Scott left the meeting at 4:15 p.m.

Mr. Herndon presented the proposed streamlined stipulation, and explained that an itemization of the contributions not properly reported would be attached to the stipulation.

Chairman Getman congratulated Mr. Wroten and Mr. Herndon for the new program.

Mr. Herndon requested that the Commission approve the $10,000 threshold, and the proposed streamlined stipulation decision and order format.

Tony Miller congratulated the staff for their work on the new program. He fully supported the $10,000 threshold as well as the streamlined process. He suggested that the penalty fines should be based on a percentage and not be a fixed amount. The proactive approach, he stated, will get people to comply and will provide a deterrent.

Chuck Bell also complimented the staff proposal, and agreed with the $10,000 threshold. He commented that duplicate filings should be explored to determine whether the public is provided sufficient information by the filing of either the donor or the recipient, and whether one should be fined if they do not file and the information is available electronically. He suggested that major donor late contribution reporting filing was duplicative if the recipients were also filing that information, and that it should be considered when studying the data.

Chairman Getman suggested that the recipient committee might be fined at a higher rate because the failure of recipient committees to report presented a greater potential for public harm, noting

that in order for the Commission to feel comfortable eliminating duplicative reporting, recipient committees will need to be forced to be more scrupulous in their reporting.

Mr. Herndon responded that, with respect to well established contributor committees, contribution information would be of value to the public in determining where their contribution patterns are. He added that staff will be exploring whether major donor violators should be prosecuted at the same level as everyone else.

Jim Knox, of California Common Cause, stated that both the contributor and recipient should file because it provides the only method of checking whether all monies have been reported. He did not agree that only the recipient should report the contributions because a lot of major donors blanket contributions to many recipients and that information needs to be followed.

Mr. Knox distributed a report which outlined a four-year study of gambling contributions to state legislators and statewide elected officials, in which over 300 reporting violations, resulting in over $1,500,000 of unreported contributions, were found by checking the recipient filings. He noted that the information should have been available on the major donor reports but was not. He supported the same fine levels for both recipients and contributors.

Commissioner Scott returned to the meeting at 4:25 p.m.

Chairman Getman motioned that the Commission accept the $10,000 threshold.

Commissioner Makel seconded the motion.

Commissioner Scott stated that she liked the idea of a streamlined procedure, but wanted more information.

Chairman Getman, Commissioners Deaver, Makel, and Swanson voted “aye .” Commissioner Scott voted “nay.” The motion carried.

Chairman Getman motioned that the Commission accept the streamlined stipulation as presented by the staff.

Commissioner Deaver seconded the motion.

There being no objection, the motion carried.

Mr. Herndon explained two fining policy options for the Commission to consider, both subject to the $2,000 statutory cap per count. One option would require a fine based on a percentage of the contribution not reported. Staff suggested 15%. The other option wouldset a fixed amount ($1,250 suggested) per count. He also proposed upgraded fines for violations in the general election cycle by the same violator. If the Commission chose to utilize the percentage option, he suggested that the upgraded fine should be 25%. If the Commission chose the fixed amount option, he suggested upgrading the fine to $1,750. Mr. Herndon recommended that the Commission accept the percentage option because the results would be more equitable, and

compared the two options with hypothetical cases. He pointed out that the FEC originally proposed a 15% fine, and settled for a 10% fine, but noted that the FEC regulation did not have a cap. He stated that using the 15% figure emphasized the importance of late contribution reporting.

Under the upgraded fine system, Mr. Herndon clarified, subsequent violators should be assessed penalties at a higher rate the next time they have a violation, and noted that, for simplicity, each election cycle would be treated as one event. He explained that if a person has a violation in the primary election cycle and then has another violation in the general election cycle, a higher level of penalty would be assessed.

Commissioner Makel stated that she supported the 15% fine.

Mr. Bell noted that the proposal is complicated and that the Commission must consider their statutory maximum, and that there must be a cap. He did not agree that the fines should be upgraded because cases would be prosecuted in a more timely manner. Mr. Bell stated that this proposal raised fines and that there is no justification for the increase. He agreed that the process would reduce non-compliance, but warned that it could lead to discouraging political contribution activity. He did not agree that the fine levels for recipients should be higher than those of major donors, and urged the Commission to retain the fines which were previously approved.

Chairman Getman noted that, under the old fine schedule, a late contribution would have received a maximum of a $1,000 fine.

Tony Miller supported the 15% staff recommendation, and stated that the previous fine schedule was totally inadequate to encourage compliance.

Scott Hallabrin, with the Assembly Ethics Committee, questioned whether this would apply to local contributors.

Mr. Herndon responded that it does not apply to local contributors, and that staff has not yet studied that issue.

Mr. Rickards noted that staff looked at what could be done quickly and in a careful and fair way. He noted that staff could look at thresholds below $10,000 as well as local contribution issues in the future, but that staff wanted to develop a process early, and noted that this approach attempted to get the attention of significant contributors and recipients, and should encourage compliance.

Chairman Getman stated that she was not troubled by raising the fine for major donor late contributors because much attention has been directed to the major donor issue, and major donors should know their filing obligations.

Chairman Getman suggested that the 15% fine option be accepted along with the upgraded 25% fine for additional violations. There was no objection from the Commission.

Mr. Herndon explained that Enforcement staff did not believe it was necessary to require that the violator file the missing report as part of settlement process, because the public harm could not be changed at that point, and because the contributions are disclosed later (in the semi-annual report) and would be a part of the public record. He noted that the reports have not been required in the past as part of the settlement process. Mr. Herndon asked the Commission to confirm that filing the missing reports not be required as part of the process.

Commissioner Scott agreed that it was a good idea. She clarified that the standard proposed by the staff may be totally proper, but that she would like to see more facts. She stated that staff did a very good job.

There was no objection from the Commission.

Chairman Getman reiterated that staff did a fabulous job on the proposal.

The Commission adjourned for a break at 4:45 p.m.

The Commission reconvened at 5:00 p.m.

Item #11. Major Donor Committees.

Mr. Wroten presented the proposal before the Commission, noting that it was a work plan outlining the staff's approach to the major donor issue. The proposal, he added, addresses changes in major donor identification, outreach and support, assistance and follow-up, and enforcement.

Mr. Wroten explained that, working with the Secretary of State's office and utilizing electronic filing by the recipients, staff will identify individuals qualifying as major donors through the first half of the calendar year, as well as those contributing $2,500 or more. Those major donors with a filing obligation will be contacted on July 31st, alerting them to their filing obligations. Those persons who do not yet have a filing obligation are not notified at that point, but may be notified during the general election period if more contributions are made and they are subsequently identified as major donors. The notification will include resources the filers can use to answer questions or provide assistance regarding the filing obligations. Enforcement Division will monitor the filings as they occur through July 31st, and if the major donor fails to make the appropriate filing by that date, staff will initiate an Enforcement investigation.

Mr. Wroten presented the fine schedule approved by the Commission in September, 1999, and recommended that late contribution violators, including major donor committees, be assessed fines based on the new streamlined late contribution fine schedule.

There was no objection from the Commission to including the major donors in the late contribution schedule.

Mr. Wroten explained that the fine for unreported late contributions of $50,000 or more were dealt with on a case-by-case base, and he requested removal of the $50,000 cap on those violations. He requested that the Commission treat all major donor contributors with the percentage fine schedule.

There was no objection from the Commission.

Jim Severson, from Reed and Davidson, noted that major donors who are close to the $50,000 threshold, should be reminded of the electronic filing obligation.

Mr. Wroten noted that it is addressed in the initial letter sent to the potential major donors.

Chairman Getman noted that there was consideration of notifying filers who had reached a $100,000 threshold instead of $50,000, but it was determined that it should be $50,000 for purposes of accuracy.

Tony Miller express his concern that a $2,500 threshold for sending letters to large contributors would be more consistent with Section 84100.5 if that amount was $5,000.

Mr. Wroten clarified that the letters would only go to those contributors of $10,000 or more, but that identification would take place at the $2,500 level.

Commissioner Scott suggested that staff review the Common Cause report and their recommendations, and report back to the Commission how many of the violations have been discovered and addressed by the FPPC. She requested that the staff explore the viability of the recommendations included in the report. Commissioner Scott expressed her concern that there was such a huge number of violations in a particular industry, and requested that a report be submitted by staff and included as an agenda item at a future meeting.

Mr. Rickards informed the Commission that he had just been handed a formal complaint from Common Cause, but had not reviewed it.

Chairman Getman expressed her concern that the Commission not discuss the matter further if an enforcement action was under review.

The Commissioners and staff discussed whether it could be on the next meeting agenda, and Mr. Rickards stated that he would advise the Commission at the next meeting if there were any matters they could discuss.

Items #12, #14, #15, #16

Chairman Getman asked that the following stipulations be approved on the consent calendar:

Item #12. ***In the Matter of Woodward Kingman*****, FPPC No. 99/812.**
Item #14. ***In the Matter of Unlimited Construction and Paul Litscher*****, FPPC No. 99/273.**
Item #15. ***In the Matter of California Cooperative Creamery State PAC*****, FPPC No. 99/818.**
Item #16. ***In the Matter of Lola Mantooth*****, FPPC No. 99/179**.

There being no objection from the Commission, the items were approved.

Item #13. ***In the Matter of Glenn T. Gilbert*****, FPPC No. 99/796.**

Commissioner Deaver stated that the fine in this case should be higher.

Mr. Rickards explained that the Commission could disapprove the stipulation and Enforcement staff could develop another stipulation.

Mr. Russo reported that Mr. Gilbert was a legislative staffer who did not file his Statement of Economic Interests (SEI) in a timely manner and that he had a history of not filing his SEI in a timely fashion. Over a five year period, he noted, there were various late periods, and because of that aggravated history, staff agreed that, in accordance with Enforcement policy, the fine should be at the next higher level. Because Mr. Gilbert did respond promptly once contacted by Enforcement the case was kept in the streamlined process.

Mr. Rickards explained that this case followed the pattern of most of the expedited SEI cases that are fined in the $200 to $300 range. He noted that the respondent did file and did get a higher fine because of his past history, and added that if the respondent files late again, the fine will be even higher.

Mr. Russo noted that in April, 2000, Mr. Gilbert did file in a timely manner.

Commissioners Makel and Deaver both stated that if Mr. Gilbert has another violation it will be dealt with more harshly.

Chairman Getman motioned that the stipulation be approved. There being no objection, the motion carried.

Item #18. Executive Director's Report.

Chairman Getman reported that the Executive Director's Report will be taken under submission.

Item #17. Litigation Report.

Ms. Gnekow reported that Mayor Jerry Brown, from the City of Oakland, sued the FPPC on June 1, 2000, and was seeking a petition for writ of mandate in front of the First Appellate District Court appealing the FPPC opinion (*In re Hicks*, No. O-99-314) passed in March, 2000, indicating that Mayor Brown had a conflict of interest with respect to his participation in certain activities related to the development of downtown Oakland. The lawsuit asked the Court to overturn the decision of the FPPC.

The meeting adjourned at 5:20 p.m.

Dated: July 7, 2000

Respectfully submitted,

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Sandra A. Johnson
Executive Secretary

Approved by:

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Chairman Getman